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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

49ER CHEVROLET, INC.; RICHARD E. WILMSHURST; ROBERT BATEY; and MARTIN GOLDBERG, Trustee in Bankruptcy of ULYSSES, INC.,

Petitioners,

v.

GENERAL MOTORS CORPORATION; INSURED TRANSPORTERS, INC.; and PACIFIC MOTOR TRANSPORT COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are "allegations of vertical price fixing generally evaluated under the 'Rule of Reason' rather than considered to be per se antitrust violations" (Opinion below at 10, lines 2-4)?

2. Where a dealer signs a contract with a manufacturer which includes absolutely no price provision for any warranty work which must be undertaken by the dealer, may the manufacturer later and at his sole option, issue "procedure manuals" setting forth price maximums for that work?

May he impose maximum prices under a formula allowing the dealer only out-of-pocket costs?

May he apply it to all parts in dealer inventory regardless of source or expense?

May he apply maximum labor charges?

May he apply maximum levels admittedly below actual costs?

May he impose the maximums upon pain of explicit dealer termination and loss of separate new car supplies for refusal?

3. Can a manufacturer cut a dealer off from further sales of his major product after many years of dealer investment where the dealer refuses to adhere to maximum price levels for repair services to be paid by the manufacturer, prices which are not negotiated or agreed to by the dealer?

4. Where a dealer stocks parts from numerous sources as part of his inventory, and a manufacturer later chooses at his option and as he pleases the parts to be sold, and their price, are those transactions not a "resale" for resale price maintenance purposes?

5. Is it vertical price fixing or otherwise in restraint of trade for a manufacturer to impose coercively maximum prices for warranty service work where the manufacturer is the buyer rather than a third party?

If the manufacturer maximum prices affect or establish dealer prices to third parties (e.g. for non-warranty work)?

If the prices are imposed horizontally across a wide range of dealer competitors?

If the price maximums compel cross subsidies precluding fair competition in the provision of auto repair services?

If there is no lawful or enforceable contract providing for manufacturer purchase at those prices?

6. Is it a defense to a vertical price fixing claim for a manufacturer, admitting price setting and coercion, that the dealer has implicitly and through his dealership relationship agreed to submit to manufacturer sole determination of prices as to all future repair transactions where the manufacturer may be involved?

7. Is the imposition of maximum prices by manufacturers upon dealers for warranty work *per se* lawful and warranting no inquiry into anticompetitive consequences, including: restraints on dealer pricing freedom, distortion of service repair markets, impact on warranty fraud, and forced cross subsidies from new car sales profits to warranty repair work and from non-warranty repair work to warranty repair work?

PARTIES

All current parties are named in the caption. There are no parent companies, subsidiaries or affiliates of Petitioners 49ER CHEVROLET, INC. or ULYSSES, INC.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 803 F.2d 1463 (9th Cir. 1986) (see Appendix A attached hereto).

JURISDICTION

The judgment of the Court of Apeals was entered on November 5, 1986. The instant Petition is timely filed under the provisions of Rule 20 of the Rules of the United States Supreme Court, and 28 U.S.C. Section 2101(c).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

1. *15 U.S.C. Section 1*: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal...

2. *15 U.S.C. Section 13a*: It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

> Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.
>
> 3. *15 U.S.C. Section 14*: It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities... or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

This case also involves the following provisions of the California Business and Professions Code:

1. Business and Professions Code Sections 17026 and 17048.5; and

2. Business and Professions Code Sections 17200, 17202, 17203.

Pursuant to Rule 21.2(8) of the Rules of the United States Supreme Court, the provisions of the above-referenced statutes are set forth verbatim in Appendix C attached hereto.

STATEMENT OF THE CASE

A. *Proceedings Below.*

The Complaint in this matter was filed on October 14, 1982 and consisted of five causes of action. Jurisdiction was invoked in the District Court pursuant to 15 U.S.C. Sections 15 and 26. Defen-

dants filed motions to dismiss on January 10, 1983. The Complaint was amended on March 21, 1983. On June 15, 1983 the trial court granted Defendants' motion to dismiss Count IV of the First Amended Complaint dealing with the Civil RICO claim. The Court denied Defendant's motions as to Counts I, II, III and V. The First Amended Complaint was answered by all Defendants on June 15, 1983.

The parties stipulated to a program of limited discovery on September 1, 1983. On September 30, 1983, Plaintiffs and Defendants filed cross motions for summary judgment pursuant to the discovery plan stipulated to by the parties and approved by the trial court. On November 4, 1984, all parties stipulated to many of the facts relevant to said motion. On May 15, 1985, following argument and requested additional briefing on the question of "tie in" violations, the trial court denied Plaintiffs' motion for summary judgment and granted the motions of Defendants, effectively entering a final judgment of dismissal to the case. The trial court's ruling is included in Appendix B attached hereto.

A Notice of Appeal to the Ninth Circuit Court of Appeals was timely filed on June 19, 1985. Pursuant to stipulation by the parties on October 25, 1985, the Court of Appeals ordered the appeal dismissed as to Defendant E.F. McDonald Company only.

The cause was argued before the Ninth Circuit Court of Appeals and a decision entered on November 5, 1986 affirming the trial court. A copy of that opinion and judgment is included in Appendix A attached hereto.

B. *Undisputed Facts.*

The parties do not dispute the basic facts. Plaintiffs' affidavits and exhibits and Defendants' affidavits submitted to the trial court are contested primarily by the opposing parties on grounds of completeness and relevance rather than accuracy. In addition, the parties have filled in numerous facts through a set of stipulated facts which supplement the record and which were partially relied upon by the trial court in ruling on the motions for summary judg-

ment. Said Stipulation of Facts is included in the excerpt of the record filed in the Court of Appeals, and shall be referred to herein by the trial court Docket No. CR-96.

Plaintiff herein focuses on a single major issue raised by the instant case: the antitrust implications of Defendant GM's warranty work pricing policies applied to dealers.

1. For many years Plaintiffs had been dealers of certain specific General Motors vehicles, each operating under a specific dealer contract. (See CR-96, Joint Stipulations #1 through #5.)

2. The Dealer contract provides in its *complete terms* as follows concerning warranty repair obligations and payments:

> (b) *Warranty Repairs and Special Policy Adjustments.* Dealer will perform (i) warranty repairs on each Motor Vehicle which qualifies for such repairs under the provisions of any warranties furnished thereon by General Motors and (ii) special policy adjustments on Motor Vehicles that are approved by Chevrolet.
>
> Dealer shall perform such repairs and adjustments on each such Motor Vehicle as and when required thereon and requested by the owner, without regard to its origin of purchase, and in accordance with the provisions relating thereto set forth in the applicable Service Policies and Procedures Manual or in service bulletins furnished by Chevrolet to Dealer from time to time.
>
> Dealer will provide each owner or user for whom Dealer performs warranty repairs or special policy adjustments with a copy of the repair order, signed by the owner or user, covering the repairs or adjustments performed.

(d) *Maintenance and Repair Service.* Dealer shall provide, at its Dealership Premises, prompt maintenance and repair service to owners and users of Motor Vehicles. Such service shall include only those services specifically requested by the owner or user of the Motor Vehicle and those that are discussed in advance by the Dealer with the owner or user as being required.

Dealer shall provide all owners and users for whom Dealer provides maintenance and repair service itemized invoices covering the details of their purchases.

(f) *Payments by Chevrolet to Dealer.* For Dealer's performance of pre-delivery inspections and adjustments, warranty repairs, special policy adjustments, and campaign inspections and corrections under and pursuant to the provisions of this subsection (2), Chevrolet shall pay Dealer for the Parts and/or other materials or shall provide Dealer with the Parts and/or other materials required in connection therewith and for labor in accordance with the provisions relating thereto set forth in the applicable Service Policies and Procedures Manual.

(Defendant GM Supplemental Excerpt at Exhibit 61, "Dealer Sales & Service Agreement," at 14-15.)

The maximum price formulas are then imposed in subsequent "Service Policies and Procedures Manuals" or in "Claims Manuals" issued without agreement by dealers or negotiation by GM. Such manuals were issued, for example, in 1980, 1981 and in subsequent years.

3. Plaintiffs, in addition to car sales, perform repair work for all types of vehicles, including dealer sold vehicles. Often the repair work may be completed pursuant to a warranty or service contract

agreement. A consumer who buys anything from Plaintiffs may receive an "implied warranty of merchantability." In addition, some dealers enter into "service or warranty contracts" or other contracts packaged by others. (CR-96, Joint Stipulations #11, #11A; CR-63, Wilmshurst Affidavit #14, #15.)

4. GM establishes express "manufacturer" warranties by its unilateral act as part of its marketing effort to consumers. (CR-96, Joint Stipulations #11, #11A; CR-63, Wilmshurst Affidavit #14, #15.)

5. A consumer who requests auto repair services receives an estimate pursuant to California law. A consumer may request that payment for work performed be paid by GM pursuant to an express warranty effective between that consumer and GM. (CR-96, Joint Stipulations #11, #11A, #12; CR-63, Wilmshurst Affidavit #15.)

6. Plaintiffs are required by GM to perform said warranty work. Although the dealership agreement includes no provisions for GM pricing formula, GM reserves the right to change the terms of its dealership contract through subsequent unilaterally issued "Service Policies and Procedures Manuals." These subsequently issued "manuals" during the term of the Complaint filed herein have then specified various formulas acceptable to GM, generally based on out-of-pocket concepts for dealer warranty work. Such recompense may not be compensatory as to a particular dealer's actual and varying costs. (CR-96, Joint Stipulations #12, #13, #14, #16, #18, #19, #20, #20A, #20B, #20C, #20D; CR-63, Wilmshurst Affidavit #16, #17, Exhibits F, G, H, I.)

7. The dealership contract of Plaintiffs includes no requirement to perform warranty work at any particular named price established therein or according to any pricing formula or concept. GM later imposes specific systems of price setting. The formulas and the numbers placed in the formulas are solely determined by GM. The formulas and numbers are subject to periodic changes by GM. Dealers are required to perform the requested warranty work and at the prices specified. Failure to perform that work is cause for

termination of a dealership. (CR-96, Joint Stipulations at #12, #13, #14, #15, #16, #17, #18, #19, #20, #20A, #20B, #20C, #20D, #21, #22, #23, #24, #30A.)

8. All three Plaintiffs have been terminated as dealers, (CR-96, Joint Stipulations #1, #2, #3.)

ARGUMENT

I.

GM'S PRICE IMPOSITION CONSITITUTES VERTICAL PRICE FIXING AND OTHERWISE UNREASONABLY RESTRAINS TRADE

GM enters into dealership contracts with independent entrepreneurs authorized to sell GM tradenamed motor vehicles. These dealership agreements are detailed contracts specifying the arrangements between GM and those dealers, including Plaintiffs. There is no provision for warranty repair work price or related terms in that contact.

GM enters into warranty obligations through its advertising to consumers who buy its vehicles. Plaintiffs purchase and maintain a substantial inventory of parts for their separate auto repair enterprise - including warranty and non-warranty work. These parts are alienated and fully owned by Plaintiffs, whether the source of the parts be GM or another supplier. The parts are stored, warehoused, inventoried, and insured by Plaintiffs.

Plaintiffs also hire mechanics to perform repair services. Both parts and labor are used to repair vehicles under GM warranty, those not under GM warranty, or those under partial GM warranty. Plaintiffs compete in repair market services with both other GM dealers in an active competitive market, and with non-GM dealers for repair work, particularly non-warranty repair services. Defendant GM competes in the provision of automobiles and in the provision of repair service plans through warranty or other ar-

rangement with a growing number of independant repair service and consumer protection plan service alternatives ranging from Allstate to Sears.

During the period described in the Complaint, GM assumed the position that it may stipulate unilaterally the maximum resale price of both the sale of parts, and charges for labor, committed to the warranty portion of work covered by GM's obligation to consumers. GM contended that it could set these maximums by issuing "policy and procedures manuals" *seriatim*, because of its dealership relationship with pre-existing dealers.

GM also provided that failure to comply with the terms of its maximum price limitations was cause for termination of the franchise. And GM further stipulated that some of the prices it imposed on dealers as recompense were "non-compensatory," that is, below out-of-pocket costs to the dealer.

Plaintiffs contend that these maximum limitations constitute vertical price fixing and otherwise restrain trade and unreasonably distort the marketplace as follows:

(1) Dealers who are burdened with a substantial amount of warranty work are put at a competitive disadvantage and are driven out of business, not on the basis of their efficiency in the marketplace, but on the basis of the financial demands of GM buttressed by the threat of termination of supply of future vehicles in which a large trade name investment has been made;

(2) Dealers are compelled to cross-subsidize their *warranty* work at the expense of *non-warranty* and other business, restraining trade in the provision of non-warranty auto repair service;

(3) GM dealers are compelled to engage in warranty fraud wherever repair work involves partial warranty and partial non-warranty repair. That is, if it costs Plaintiffs $10.00 per hour to pay their mechanics and GM requires an $8.00 per hour ceiling on work done under its warranty, the dealers would have to charge more, e.g. $12.00 per hour on the non-warranty portion of con-

sumer's bill. Hence, the consumer is not really receiving the benefit of the warranty as promised by GM since he is having to pay a higher price than is the competitive norm for the non-warranty portion of his bill to secretly subsidize GM. The consumer may have a claim of warranty fraud against both the manufacturer and the dealer;

(4) To the extent the dealer avoids warranty fraud by charging a consistant price whether under warranty or not, the maximum price stipulated by GM then becomes the resale price for all repair work of that dealer, whether under warranty or not;

(5) The warranty subsidy system imposed by GM impedes fair competition by alternative providers of repair services. Alternative repair services cannot compete with GM's optional and other warranty plans. GM dealers must perform those services at below competitive levels and cross-subsidize those services from other sources. Hence, more efficient and desirable competing repair service plans, particularly the increasing number of pre-paid plans being made available by a variety of vendors, are unfairly hampered in the marketplace because of the restraints placed upon GM dealers to give the GM warranty service contract a false advantage. That advantage is based on GM bargaining power in auto provision and on dealer prior investment threat of loss, not on economic performances in an unrestrained marketplace; and

(6) Independent entrepreneurs are precluded from setting competitive prices for the sale of their products and services.

In *Albrecht v. Herald Co*, 390 U.S. 145 (1968), defendant manufacturer established exclusive territories for delivery of newspapers. The defendant, in order to protect consumer interests, set maximum prices for the resale of those newspapers to consumers. The absence of competition between plaintiff and others delivering those newspapers made a maximum price directive by the defendant particularly compelling. The Court, however, imposed the *per se* rule and precluded the imposition of maximum prices. Here, we have an environment where numerous GM dealers provide vigorous competition for the provision of GM

warranty work. In addition, GM has many other potential ways to accomplish its warranty work where dealers operate at excessively high prices. And there is no indication from the record that the marketplace is not sufficient to provide this check. Moreover, Plaintiffs stipulate to no objection to GM's providing that all dealers must charge a *non-discriminatory* price for warranty work *vis-a-vis* non-warranty work. This single provision, which does not involve the imposition of maximum prices by GM on independant dealers, protects GM from excessive prices as to the obligations GM enters into with others through warranty promises.

II.

THE COURT OF APPEALS ERRED IN HOLDING VERTICAL PRICE FIXING NOT TO BE *PER SE* UNLAWFUL AND IN HOLDING THE PRICE COERCION NOT TO INVOLVE A "RESALE"

The Court of Appeals' opinion and ruling on the warranty pricing practice of GM is stated in its full presentation:

> [T]he dealers' argument ignores the principal that allegations of vertical price-fixing are generally evaluated under the 'rule of reason' rather than considered to be per se antitrust violations. *See Quality Auto Body*, 660 F.2d at 1202-03. In addition, it is a longstanding antitrust principle that Section 1 of the Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. *Id.* at 1205 (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)). *Cf. Monsanto Co.*, 465 U.S. at 761 ('A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.'). Applying these principles to the facts of this case, the district court properly concluded that GM's damage repair arrangements with its dealers did not constitute a vertical price-fixing arrangement in violation of the Sherman Act.

The GM dealers contend that the arrangement for compensating them for work done under the manufacturer's warranty was per se unlawful for two reasons: (1) it was an unlawful form of price fixing; and (2) it involved an illegal tying arrangement. Neither contention has merit.

Price-Fixing. The dealers argue that the existing system by which GM compensates dealers for warranty repairs is a per se unlawful form of vertical price-fixing. Specifically, the dealers complain that their rate of compensation is "fixed" by the terms of the Service Policies and Procedure Manuals. They challenge the lawfulness of these "fixed" prices based on certain cases holding that the setting of minimum and maximum resale prices by manufacturers or suppliers violates the Sherman Act, Section 1. *See, e.g., Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (publisher's establishement of maximum resale price of newspspers held per se violation of Section 1); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 240 U.S. 211 (1951) (distillers' agreement to fix maximum resale prices of their products sold by distributors held per se violation of Section 1).

The dealers' reliance on the resale price maintenance cases is misplaced. This is simply not a case involving the "resale" of any goods or services to retail customers. The stipulated facts clearly show that owners of new cars are not charged for warranty repairs. Because the dealer compensation arrangement challenged here does not involve any kind of resale, the cases relied on by the dealers are inapplicable.

The warranty repair compensation arrangements at issue here are best characterized as agreements between GM and its dealers to establish a price at

> which GM will buy warranty repair parts and services from its dealers. Because such arrangements are not manifestly anti-competitive, we do not believe that they consititute per se violations of the antitrust laws. *See Medical Arts Pharmacy v. Blue Cross & Blue Shield,* 675 F.2d 502, 504-06 (2d Cir. 1982) (pharmacy agreements, which establish the maximum price Blue Cross will pay participating pharmacies for prescription drugs, are not per se illegal). Accordingly, we conclude that the district court properly dismissed the dealers' antitrust claims based on alleged price-fixing of the rates at which GM compensated its dealers for repairs made under GM warranties. (Opinion below at 10-12.)

The Court of Appeals erred, first as a matter of law, in declaring that vertical price fixing is not "per se unlawful" (at p. 9, lines 8-26, p.10, lines 1-4). This is a basis for error since the Supreme Court's holding concerning the *per se* validity of vertical price fixing has not been reversed. (See *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752 (1984).)

Second, the Court of Appeals excuses the violation as not a "resale" because it is simply part of an "agreement" between GM and its dealers, and is hence not a "resale."

The first argument of the Court of Appeals addresses an issue of growing confusion, but goes far beyond any Circuit in abolishing the vertical price fixing *per se* rule. At least eight other circuits continue to hold vertical price fixing *per se* unlawful, including maximum vertical price fixing.

The second argument presents a number of issues of first impression. What is a "resale?" What constitutes a lawful "contract" such that the dictated pricing of a manufacturer as to products sold allegedly to him is a voluntary agreement which does not restrain trade? What must be the elements of such an agreement to avoid either the *per se* rule or general prohibition against unreasonable restraints?

A. *Vertical Price Fixing Should Remain A Per Se Prohibition.*

Monsanto Co. v. Spray-Rite Service Co., 465 U.S. 752 (1984) holds that vertical price fixing remains *per se* unlawful. And it has been traditionally well settled that, if *per se*, the prohibition applies to both minimum and maximum resale price setting; see *Kiefer-Stewart Co. v. Seagram and Sons*, 340 U.S. 211 (1951).

A review of vertical price fixing cases indicates that the *per se* rule has been consistently applied until the instant case. Cases not applying the *per se* rule have done so in the context of finding a manufacturer's prices imposed upon an agent and hence not a separate entity entitled to pricing discretion, or because there was not "coercion." In *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir. 1983), the Eighth Circuit wrote:

> Mack argues that it is inappropriate to apply the presumption of unreasonableness imposed by a *per se* rule to the case at hand, because Mack's program is not a 'naked restraint' of trade that explicitly fixes resale prices. In addition, Mack argues that its program involves 'substantial competitive virtues.' Finally, Mack argues that the *per se* rule is more generally applied to horizontal rather than vertical arrangements, and notes that its program is implemented vertically.
>
> We agree with Mack that the vertical restraints in this case should not have been evaluated under a *per se* standard of illegality. After examining the record, we fail to find sufficient evidence that Mack's sales assistance program constituted either an obvious pricing-fixing scheme, to which the *per se* rule automatically applies, or a more subtle vertical restraint, to which the *per se* rule applies when justified by repeated judicial experience. *Id.* at 845.

Note that the issue in *Mack* is whether or not the resale prices are coercively fixed where there is a discount system implemented by the manufacturer which is related to dealer prices and hence may *affect* dealer prices. "Not enough coercion," writes the Eighth Circuit, may mean no *per se* application — indeed, no price fixing.

Likewise, the Tenth Circuit used the same analysis in *AAA Liquors, Inc., et al. v. Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982):

> The small retailers assert that the record establishes as a matter of law an agreement, combination, or conspiracy affecting prices; they assert that once such an agreement is found the cases holding vertical price maintenance agreements to be *per se* violations of the Sherman Act render unnecessary any further inquiry expect with regard to damages, which have been stipulated. [Citations omitted.] While we agree that resale price maintenance agreements are *per se* unlawful, all vertical arrangements affecting price do not constitute resale price maintenance agreements. 'The crux of any price-fixing agreement is the relinquishment by a trader ... of the freedom to set prices in accordance with his own judgment.' [Citations omitted.] Although a supplier may suggest a resale price, [citation omitted], the supplier may not coerce the seller's adherence to that suggested price [citations omitted] (tying arrangement condemned because they 'coerce[] ... abdicaton of buyers' independent judgment'). (*Id.*, at pp. 1205-1206.)

These cases are consistent with the *Monsanto* notion that vertical price fixing is *per se* but that there *must be coercion* and that proof of such coercion must include more than a *Colgate* refusal to deal with a single dealer for whatever reason or the receipt, without more, by a manufacturer of a complaint from a dealer who competes with the plaintiff dealer about his prices.

Meanwhile, in *Jack Walters & Sons Corp. v. Morton Buildings, Inc.*, 737 F.2d 698 (7th Cir. 1984), Judge Posner wrote that: "[T]he continued vitality of *Albrecht* is in doubt after *Continental TV, Inc. v. GTE Sylvania, Inc.* [433 U.S. 36 (1977)]..." (at 706). And the Seventh Circuit noted that: "[W]e mention the point to avoid creating the impression that we consider maximum price fixing always and everywhere unlawful (unless horizontal)...)" (at 707).[1]

Although inconsistent with the *Albrecht* holding, the Seventh Circuit's analysis simply makes the familiar argument that *GTE-Sylvania* allows vertical allocation of territories — a more extreme restraint than price fixing. If a manufacturer chooses to set up exclusive territories (monopolies for his product, albeit with inter-brand competition) why can't he compel prices? Is it more restrictive to tell someone "you can't sell *anything* in L.A. County since we already have an exclusive dealer there," than it is to say "you must not charge above X?"

The instant holding of the Ninth Circuit goes far beyond this conclusion to introduce a whole new concept. The Ninth Circuit is saying "... allegations of vertical price fixing are generally evaluated under the 'Rule of Reason' rather than considered to be *per se* antitrust violations" - period (Opinion below at 10, lines 2-4).

The Ninth Circuit now holds in an opinion to be published, that vertical price fixing, in any form, and as a rule, is not *per se* unlawful. And it is doing it in the context of admitted and systematic coercion of all dealers and where there are no *GTE-Sylvania* exclusive territories involved. It is indeed reversing *Albrecht*, but it is going much further in its holding.

Finally, Plaintiffs respectfully contend the granting of summary judgment of dismissal in the face of the peculiar restraints applicable, even in a rule of reason context, transforms the rule applied here from *per se* unlawful to *per se* lawful.

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[1] For a detailed discussion of the current confusion wrought by *Monsanto*, and confronting these litigants, see Flynn, *The 'Is' and 'Ought' of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 Cornell L.Rev. 1095 (1986).

It is particularly disturbing to see the instant holding in light of the decision of the same Circuit just one year prior in *Northwest Publications, Inc. v. John D. Crumb, et al.*, 752 F.2d 473 (9th Cir. 1985):

> The Court in *Albrecht* reaffirmed its view that maximum price-fixing is as pernicious as minimum price-fixing. *Albrecht,* 390 U.S. at 152. One evil of maximum price-fixing is that it substitutes the seller's judgment for market forces. It may also prevent the dealer from furnishing optimal services, and it may channel distribution through large or specifically advantaged dealers. *Id.* at 152-53.
>
> Northwest argues that the *per se* rule for maximum vertical price-fixing should be abolished. Although maximum vertical price-fixing arguably benefits consumers, the intended beneficiaries of the antitrust laws, we may not reject the clear precedent of *Albrecht* and its progeny. (at 475)

The general procedures for warranty payment were very recently discussed in *Link v. Mercedes-Benz of North America*, 788 F.2d 918 (3rd Cir. 1986). Here is a case illustrating the typical auto manufacturer practice. As with other (non GM) manufacturers, the warranty service work prices are set by the market, with dealer freedom to price, if not discreminatory, against the warranty work. Except, Mercedes Benz did distribute price lists for parts (which could be used, as here, for both warranty and non-warranty work). Plaintiffs contended this was vertical price fixing, and perhaps an indirect way of horizontal price fixing between dealers. The Court held that the parties have legitimate reason to exchange information about prices and that there was no liability because there were independent business reasons for dealer behavior as described separate and apart from any list distribution. Further, and most important, there was complete freedom by dealers to ignore the price information (at 923). Forty-one fact witnesses showed that individual dealers "independently decided

whether to use the Mercedes guide or any other method for determining repair charges" (at 923). It is apparent that the lack of coercion was necessary for defendants to escape liability:

> ...Mercedes' dealers 'were acting independently' in setting their prices for repair work. See *Monsanto [v. Spray-Rite Service Corp.*, 465 U.S 752, at 704 (1984)]. Based upon the documentary evidence alone, *because* appellants did not exclude the possibility of independent action, it cannot reasonably be said that 'the moving party is entitled to a judgment as a matter of law' " (at 923). (Emphasis added.)

In the instant case, we have a stipulation that independent action as to prices is precluded. There is an admitted termination sanction.

In later quoting *Monsanto Co v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the *Link* Court notes: "Under our antitrust laws, a manufacturer such as Mercedes may only engage in unilateral action with respect to prices its dealers charge customers. It may not agree or contract..." (at 925). GM may suggest prices or circulate information. But it cannot impose them, even if it calls it a "contract."

B. *The Prices Are Applied To A "Resale" Because There Is No "Agreement" Between The Parties.*

The characterization of the instant arrangements as "not involving resale" does not stand scrutiny. These items are totally alienated in the dealer. Under what theory can a manufacturer enter into an agreement with a dealer which says: "I shall give you a dealership on the understanding that items in the future and laborers you may hire in the future, which you are supposed to control as a part of your basic entrepreneurial rights, shall be subject to the prices I shall later dictate if I want to buy them. I shall decide later which products I shall set the price on and tell you what the maximum price shall be. I shall tell you what the max-

imum labor charge shall be as for any product or service you may later sell back to me or to another on my behalf, as I choose."

Although it may be argued that these transactions are not simply "back to General Motors" but to third parties with partial GM payment obligation, even if they were fully back to GM they would still be a resale of items as selected by GM at a later time. How can it not be a resale when it applies to items totally alienated in the dealer regardless of source (GM or not) as to the product's final sale to its final consumer below the retail level?

Such a carte blanche power to set prices for such a large category of goods, in proportion to the total business of an independent entrepreneur, cannot be countenanced as a "reasonable restraint," or as a categorical excuse to *per se* price coercion simply because one of the parties characterizes it as pursuant to an "agreement."

The Court of Appeals opinion would avoid the important and *bona fide* abuse brought before this Honorable Court by calling it an "agreement," when both parties have stipulated that the dealers have *not* agreed to having their prices set at levels GM is attempting to impose. (See Opinion at 11 - 12.) We have the general dealer agreement simply authorizing warranty work in one vague sentence, followed by the unilateral issuance by GM of "policy and procedure manuals" later setting forth maximum price structures. Such a contract could be imposed by a bullying manufacturer over virtually any vertical price fixing case. The theory here advanced by the Court of Appeals is certainly a matter of first impression — and is exceedingly dangerous as a precedent.

If the instant case involves a "contract" between two parties as to prices, where is it? Is it the dealership agreement? (See CR-63, Wilmshurst Affidavit in Support of Plaintiffs' Motion for Summary Judgment, Ex.A.) But there is nothing there specifying that GM and the dealer agree that the price for warranty work shall be: x, y, z, etc. There is not even anything providing that GM shall set these prices. There is a vague reference to "subsequent manuals" to be periodically published by GM for unspecified purposes. These manuals did indeed then specify mandatory prices for

dealers. But these were not "contracts" in any consentual sense. (See complete quotation of warranty work provisions, *supra*).

Such a "contract," if it existed, would read: "dealer hereby agrees to set repair work prices for all warranty work as GM will determine, when and as it sees fit." We do not even know what products the dealer has bought which he is "contracting" to resell. We do not know the price. GM will tell the dealers both when it is ready to transact. Is this an enforceable contract? It appears to be a unilateral demand of the right to set the prices of another.

The biggest concern of vertical price fixing is the bullying or coercion by a supplier of the resale prices to be charged by an independent entrepreneur. And this protection is applied with special care to dealers. See *Simpson v. Union Oil Co.*, 377 U.S. 13, 84 (1964). For though they are obliged by contract to perform certain distribution functions, as an independent entity they retain the right to operate their own businesses. Of all of their rights, the most protected is the right to choose the prices for the products and services they sell.

What GM must be arguing goes something like this: "This is all one deal. We sell certain items to the dealers with the understanding that they will sell them back to us at a certain price if appropriate . . . This is not really vertical price fixing but a sale by us with a kind of option retained by us to buy them back at certain prices." Here, we have lots of problems.

Problem 1: How can this apply to the labor charges GM requires? Is GM selling labor to the dealer on the understanding that there is this kind of option to return on the item? How?

Problem 2: How about all of the items where GM specifies resale prices which do not come directly from GM?

Problem 3: Even as to items sold by GM to a dealer, where has GM provided for specific prices by contract? Where is that contract?

Problem 4: Can GM even theoretically enter into a contract where it says: "I shall sell you certain items, and if I want these items later I shall be able to buy them back at prices I shall later stipulate separate from this contract and according to my fiat?"

Problem 4 is especially troublesome. Forgetting about labor and about items not deriving from GM, it may be possible for GM to enter into a contract which says: "Dealer, I shall sell you these widgets on the understanding that if I want to buy them back I shall be able to buy them at $4.50 each," or even "according to the following formula — invoice cost plus 12%." *This* is a single contract (no horizontal price fixing) and a voluntary consentual contract (no vertical price fixing). But can GM say, "I am going to sell you widgets, and you will resell them to me at prices I shall later stipulate? And failure to follow the stipulated prices results in sanctions." Of course, the dealers here have signed no such contract and none has been produced. But GM contends that such power is somehow implicit in its manufacturer-dealer relationship.

C. There Is Third Party Impact Making The Coercion Applicable To Resale Prices To GM And Others.

The fact of resale price setting is emphasized not only by the ephemeral nature of the alleged "contract," but by the pricing policy impact necessarily beyond GM warranty work — with numerous ancillary restraints. Let us assume that warranty work is a large but not total portion of a dealership's repair operations and that the repair revenues are a substantial portion of total operations. Let us further assume that the dealership or entity offering warranty coverage is selected by the consumer. And let us assume that a large portion of the bills will include work partially covered by warranty. Some of it will be paid by GM and some by the consumer. Other consumers will have no warranty coverage, or perhaps coverage under an implied warranty which would be covered by the dealer, or even under a service contract purchased elsewhere. All of these assumptions are consistent with the stipulated facts herein, and are common knowledge as well.

If GM imposes, for example, a $7.00 per hour figure on labor where a dealer is paying out $8.00, the dealer does one of two things to comply with GM's alleged "contract." One, he charges all of his customers $7.00. In this case, the GM charge dictates his prices, to the extent they must be uniform, between customers, or even within a single bill involving both warranty and non-warranty work. Hence, under this alternative, the practical effect of the "bilateral" contract is to fix dealer's prices well outside the two party relationship. If dealers' labor costs go up to $8.00, he risks going out of business, which became the problem for these Plaintiffs.

The only other alternative for the dealer is to engage in price discrimination. Where the labor price to the dealer goes up to $8.00 and he can only charge $7.00 by GM command, he must make up for the loss elsewhere. He may not be able to do so on parts (where there is similar price imposition). He must then get it from non-warranty work. Indeed, GM's prime defense is that this is a "contract" just between the parties — third parties are not involved. So now our consumer receives a bill for $500, half done under warranty and half not. He is to be charged higher labor and parts rates for that part of the bill *he* pays. The consumer can be misled into ignorance about this disparity or he may become aware of it. The dealer must then explain to him "we charge GM $7.00 an hour for labor but it costs us $8.00 per hour so we have to charge you $9.00 per hour to make up for it on the non-warranty work." The consumer is going to think, with some justification: "This warranty is a fraud because I am promised full coverage of the cost to repair x, but actually I am paying more for the non-warranty work in order to lower GM's warranty obligations. They are cheating me by getting me to pay part of their bill."

The consumer would be correct. But these are the two alternatives faced by the dealer. It is difficult to see how these prices do not have a direct pricing consequence outside these parties — even if a Court were to accept the "contract" defense given the lack of contract elements (such as "offer," "acceptance" and "price").

The understandable antipathy toward warranty fraud on the part of the dealers is not the only factor compelling uniform pricing at the GM dictated level for all repair work. There is also the

problem of price discrimination liability under the Robinson-Patman Act (see 15 U.S.C. Section 13(a)) particularly as to the manufactured parts being sold. What about competing service contracts wishing to provide coverage for purchase of repair parts? Certainly this is an important area of commerce. If consumers sign agreements with other service providers, can the dealer then charge $12.00 for a part for GM and make up the loss on the dealer's $14.00 cost for that part by charging the competing service plan $16.00 when *it* buys the same part? Will that affect the competing service's rates and ability to compete with GM or others? One would think so. Can it charge $16.00 to the GM competitor while GM demands and pays only $12.00? Does that make the dealer an antitrust violator, i.e. a conspirator? If rendered legitimate by the Court and adopted by other manufacturers, would this GM practice impact effective alternative car repair service plan competition?

These questions do not end the practical difficulties faced by dealers when they are responsible for their own operations, but have their prices set by another entity with its own understandably separate agenda. Take, for example, the California Unfair Practices Act, which specifically prohibits below cost pricing in the delivery of warranty services. Since 1977, it has been unlawful for any manufacturer or retailer, or any agent of either, to enter into any contract for the performance of warranty service or repair work for products manufactured, distributed or sold by such persons, at a rate below cost. (See California Business and Professions Code Section 17048.5 reprinted in the Appendix.) There are two facets to this prohibition which are very important. First, there is no requirement that the intent of such sales below cost have the "purpose of injuring competitors or destroying competition" as is generally the case. (See California Antitrust Law and Practice by Folsom and Fellmeth, Butterworths, 1983, at Sections 131, 136, 139.) Second, the standard of minimum lawful cost is "fully distributed" cost for warranty work, which includes *full allocation for overhead* (see California Business and Professions Code Section 17026).

GM has spent the substantial portion of its evidentiary case attempting to show that its formulas for setting mandatory prices are

reasonable. But GM has admitted non-compensatory prices were sometimes mandated, even on a marginal cost basis. Plaintiffs have argued additionally that the formula is not of great use to the dealers if GM is able to decide unilaterally what numbers are to be plugged into it. These dealers do not agree with the numbers or the formula, as applied to them. But, in addition, these formulas are based on marginal (or out-of-pocket) cost factors. They do not calculate fixed costs in the way required by California law. They are, by their own terms, too low — at a level literally unlawful under the Unfair Practices Act standard of Section 17026 of the California Business and Professions Code: " 'Cost' as applied to warranty service agreements includes the *costs of parts, transporting the parts, labor and all overhead expenses of the service agency.*" (Emphasis added.) That is *not* either of the two formulas of GM. They are not keyed to these cost factors as they in fact impact a particular dealer (dealer actual cost of parts, actual labor, etc.) and they do *not* include overhead allocation in any legitimate sense.

D. *The GM Practice Does Not Meet Proper Criteria For A Contract Defense.*

The question presented by the GM defense and the Court's opinion below is: What are the criteria to distinguish a legitimate two party contract specifying a price between them from a coercive vertical arrangement simply "called" a contract? We would respectfully suggest six criteria: (1) ownership interest in the items and matters subject to the contract, (2) voluntariness, (3) contract specificity as to the product or service purchased, (4) contract specificity as to the contract price, (5) extent and length of contract coverage, and (6) third party direct impact. To the extent the contract concerns interference with the property interests of a merchant (post alienation), is involuntary, does not identify in the contract which products will be subject to it or the prices which will be paid, extends to a large portion of the business operations of an entrepreneur, is unlimited in duration, and has third party direct impact, it would appear to be other than a contract. In fact, it would appear not to be a contract at all.

Admittedly, these criteria gravitate against allowing the term "contract" to shield the practice here complained of, since we have application *in extremis*. But the criteria would appear to conform to antitrust policy concerns, as well as standard common law contract doctrine. We here have an involuntary contract to allow GM to set prices which is not agreed to orally or in writing anywhere. It is a contract which, if so written, would specify one party authority to determine products and services covered (dealers have no role in GM warranty coverage), to determine and alter prices as GM sees fit with no time limitation, as to unspecified items totally alienated and possessed by dealer entrepreneurs, with third party prices impact.

E. *GM Has Less Restrictive Alternatives.*

In order to accomplish legitimate warranty protection, GM does not have to specify mandatory prices. Others do not. Perhaps more than most, GM has dealership competition for service work. And it can sign service arrangements with others as well to perform warranty work. There is competition for auto repair work, it is not a natural monopoly. GM may be justified in providing that the prices it will pay shall be no more than a given dealer charges in the normal course for his non-warranty work. This single provision protects GM. It guarantees that GM will be charged market price.

Fraudulent or excessively high prices have a market impact. Indeed, most states have advance estimate requirements which must be submitted in writing, and regulartory controls over unfair pricing abuses. Three such agencies function in California for related purposes: the Department of Motor Vehicles licensing facilities, the New Motor Vehicle Board and the Bureau of Automotive Repair.

The "no discrimination" provision by GM would reasonably prohibit dealers from discriminating against GM — which is bound by previous commitment to pay certain costs. At the same time, it would not require dealers to accede to GM price discrimination demands imposed coercively in favor of GM.

If GM wishes to negotiate long term consentual prices with dealers in order to achieve long term price predictability, that also would probably not be subject to antitrust objection. But the agreements would have to be consentual.

In general, dealers have a strong incentive to want to engage in profitable work, including warranty work. The dealers may have legitimate warranty obligations. But the dealers have not surrendered their right to market price for their work. There has been no showing anywhere in this case, and no contention by GM, of any abuse or market flaw which inhibits proper market-determined prices for warranty or non-warranty repair work.

III.

THE HEALTH PROVIDER CASES CITED BY DEFENDANTS AND THE COURT OF APPEALS AMPLIFY THE UNLAWFUL NATURE OF THE WARRANTY CLAIM PRICE IMPOSITION

GM's central defense of its required pricing system rests with the medical "provider" cases. But in all of these cases we have an insurance entity going to a pharmacy and saying "I have 800 subscribers and we will do business with you at $6.50 per 100 mg. of tetracycline, $8.20 per 100 mg. of elavil, etc." The pharmacy can say "Yes, I want the business at those prices," or it can say "No, that is not enough margin to be worthwhile, I pass." The Courts, as GM has quoted at great length, have approved these arrangements notwithstanding whatever horizontal restraints might be involved in the organization of many buyers through the plans. The plans are deemed legitimate business ventures of voluntary association and the resulting prices established by consentual contract. Plaintiffs very much agree.

The distinction in this case is more than a tangential difference; it goes to the center of the vertical price fixing prohibition. For if our pharmacy does not wish the business at the proffered prices, it declines those sales. That is all it loses. And that is its marketplace choice and appropriate consequence. The medical cases analogy

would be applicable to the instant case if the insurance firm were to say "by the way, you will receive $6.50 for that tetracycline, I do not care if it costs you $8.00. And you *will* sell it to my subscribers. If you do not, you will receive no further drugs to sell, including separate products your customers have relied upon for years — indeed, you will receive none of the new products you have been selling. You can always sell Herbalife."

Theoretically, these Plaintiffs could, after years of investment in a trade name, open a new dealership with different vehicles and start all over again. That is the alternative presented by this case and in direct oral argument by GM. It is not the same situation presented by the prepaid health provider cases at all. Given the fundamental focus of vertical price fixing and tie-in prohibitions on the right of dealers and franchisees to be free from coercive interference, the difference between the cases cited by GM and the situation stipulated to here goes to the heart of the policies at issue. See *Simpson v. Union Oil Co., Supra*, 377 U.S. at 844.

GM has relied heavily and the Court of Appeals exclusively on *Medical Arts Pharmacy, Inc. v. Blue Cross and Blue Shield of Connecticut*, 675 F.2d 502 (2nd. Cir. 1982). However, both have omitted the important distinctions in the *Blue Cross* case from the present action. Blue Cross concerned agreements between Blue Cross and "participating" pharmacies pursuant to Blue Cross' subscriber agreements with its insured. *Id.* at 503.

The Court found no *per se* violation nor anticompetitive effect because of the "novelty" of such restraints, the "normal insentivity of drug prices," and the ancillary nature of such arrangements to efficient insurance coverage to the insureds. *Id.* at 505-506.

Once again, and absolutely critical, the pharmacy plaintiffs in *Blue Cross* could reject the business if they did not like the fixed prices. In the present case, however, the Dealers' only option is to not be paid at all for their labor and parts for the repair work. Not only are the prices fixed in the present case, they are also forced upon the Dealers whose only alternatives are no reimbursement, or termination of their GM franchises.

All of the aforesaid characteristics: the relationship of the parties, the lack of alternatives, and the non-voluntary nature of the participation by Dealers, lead to the conclusion that the price-fixing involved herein constitutes a *per se* violation of the Sherman Act.

CONCLUSION

WHEREFORE, based on the foregoing, Plaintiffs respectfully request that a Writ of Certiorari be granted.

Respectfully submitted,

CLARK & GUMPEL
A Professional Corporation

By: /S/
ROBERT C. FELLMETH

Attorneys for Petitioners 49ER CHEVROLET, RICHARD E. WILMSHURST, ROBERT BATEY, and MARTIN GOLDBERG, Trustee in Bankruptcy of ULYSSES, INC.

APPENDICES

A.

OPINION AND JUDGMENT OF THE NINTH CIRCUIT COURT OF APPEALS

For Publication

FILED

NOV 5 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

49er CHEVROLET, INC., et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	No. 85-5966
vs.	)	
	)	DC No. CV 82-1363-T
GENERAL MOTORS CORPORATION, etc., et al.,	)	OPINION
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court
for the Southern District of California
Howard B. Turrentine, Senior District Judge, Presiding
Argued and Submitted August 6, 1986
Pasadena, California

BEFORE: TANG and BRUNETTI, Circuit Judges, and
B. THOMPSON,*District Judge.

TANG, Circuit Judge:

Three former automobile dealers ("the dealers") appeal the district court's grant of summary judgment in favor of General Motors Corporation ("GM") and several other defendants. The dealers challenge: (1) GM's arrangements for paying dealers for repairing vehicles damaged in transit; and (2) GM's arrangements for compensating dealers for repairs performed under GM's warranty to retail customers. We affirm.

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* Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

BACKGROUND

This lawsuit was initiated by three former automobile dealers who had franchise agreements with GM. The dealers sued GM, Insured Transporters, Inc., Pacific Motor Transport, and E.F. MacDonald Company. The defendants were charged with: (1) engaging in horizontal and vertical price fixing, and illegal tying arrangements, in violation of the federal antitrust laws; (2) violating federal anti-racketeering laws; and (3) violating various state laws relating to unfair trade practices.

According to the undisputed facts, the automobile and truck divisions of GM enter into written agreements with individual persons or entities that sell and service motor vehicles. Each Dealer Agreement establishes an authorized dealer for a particular GM Division, sets the location from which the dealer will operate, identifies the dealer's individual owners and managers, and otherwise governs the relations of the parties. Under the Dealer Agreements, GM is obligated to deliver vehicles to the dealers in an undamaged and merchantable condition. GM contracts for delivery of the vehicles with various independent carriers including defendants Insured Transporters and Pacific Motor Transport.

Vehicles occasionally sustain damage while in possession of a carrier in route to a GM dealer. The Dealer Agreements provide that the dealers shall repair vehicles damaged in transit and shall submit to GM their claims for payment for repair work. Dealers may not make any claims directly against the carriers. GM explains the procedures for submission of damage claims in its Service Policies and Procedure Manuals. GM determines the amounts it pays dealers for labor, parts, and necessary accessories in accordance with the provisions of the applicable manual. GM prepares these manuals and changes or amends them from time to time, based on what GM believes to be pertinent business conditions. The dealers contend that GM's price schedules for in-transit damage sometimes require them to perform non-compensatory repair work.

The Dealer Agreements obligate dealers not only to repair vehicles damaged in transit, but also to perform repairs needed to satisfy GM's limited express warranties to its retail customers.[1] GM alone determines the extent of the warranty on its parts and vehicles. The Dealer Agreements provide that GM will pay the dealers for repairs arising from GM's warranties in accordance with the Service Policies and Procedures Manual. Dealers shall not impose any charge for such service on retail customers. GM bases the amount if pays for warranty repairs on such factors as the amount of labor required to perform the repair, the dealers' customer labor rate for non-warranty service, the dealers' cost for labor and parts, and an allowance for the dealers' overhead. In performing warranty repairs, GM dealers may use parts manufactured by others than GM; however, if non-GM parts are used, GM does not warrant such parts and dealers are required to explain this to their retail customers. The dealers contend that these procedures force them to accept compensation for work performed to fulfill the manufacturer's warranty at a lower price than they would normally charge in a competitive environment.

The original complaint in this action alleged five federal and state claims. After the complaint was amended, the district court granted the defendants' motion to dismiss the federal racketeering claim and denied their motion as to the remaining claims. After a stipulated program of limited discovery, oral argument, and supplementary briefing, the district court entered summary judgment for the defendants on all the remaining federal counts and dismissed the pendent state claims. The dealers timely appealed.

On appeal, the dealers have abandoned their racketeering claim and, relying on federal antitrust laws and California state laws, continue to challenge: (1) GM's system of payments to dealers for repairing vehicles damaged in transit, and (2) GM's system for compensating dealers for repairs performed under the manufacturer's warranty.

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[1] Dealers often offer their own independent and additional warranties or service contracts for which they alone are responsible. These are not at issue in this lawsuit.

DISCUSSION

I

Standard Of Review

This court reviews the grant of summary judgment de novo. *Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1362 (9th Cir. 1986)(citing *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983)). Our role is to determine, viewing the evidence in the light most favorable to the non-moving party, whether there exists any genuine issue of material fact and whether the substantive law was correctly applied. *Id.*; *Golden Gate Acceptance Corp. v. General Motors Corp.*, 597 F.2d 676, 677-78 (9th Cir. 1979); Fed. R. Civ. P. 56(c). Where there are no disputed facts, we must determine only whether the substantive law was correctly applied. *Amaro v. Continental Can Co.*, 724 F.2d 747, 749 (9th Cir. 1984). Although summary disposition is disfavored in antitrust suits where motive and intent are at issue, *see Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), it is available in appropriate cases. *See Ralph C. Wilson Industries*, 794 F.2d at 1362; *Ron Tonkin Gran Turismo v. Fiat Distributors*, 637 F.2d 1376, 1381 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981).

II

Dealer Compensation For Transit Damage Repairs

The dealers contend that the prices they received for making repairs to damaged vehicles where unlawfully fixed in two different ways: (1) *horizontally* between GM and the transit companies; and (2) *vertically* when these fixed prices were imposed on them. The dealers argue that these alleged agreements to fix prices were illegal per se under the Sherman Act, Section 1. We agree that the district court properly rejected these contentions.

A. *Horizontal Price-Fixing*

The Sherman Act, Section 1 proscribes "Every contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1. It

is well established that a combination formed for the purposes of fixing prices is illegal per se under the Sherman Act. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-56 (1982). However, the Supreme Court has deemed it of considerable importance that independent action by a single entity be distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain trade. *Fisher v. City of Berkeley*, 106 S. Ct. 1045, 1049 (1986). The Court has stated: "Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement." *Id.*; *see also Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195, 1200 (7th Cir. 1981) ("no liability can be predicated on Section 1 in the absence of some type of concerted action"), *cert. denied*, 455 U.S. 1020 (1982); *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 110 (3d Cir. 1980) ("Unilateral action, no matter what its motivation, cannot violate § 1."), *cert. denied*, 451 U.S. 911 (1981).

The dealers contend that GM has combined with Insured Transporters and Pacific Motor Transport to set a low and artificial maximum price which will be paid to the dealers for transportation damage claims. This charge is unconvincing. To prevail, the dealers must prove that GM and the carriers had a conscious commitment to a common scheme designed to achieve an unlawful objective. *See Ralph C. Wilson Industries*, 794 F.2d at 1365 (citing *Edward J. Sweeney & Sons*, 637 F.2d at 111). Furthermore, the dealers must come forward with specific factual support for their allegations. *See id.* (citing *Program Engineering v. Triangle Publications*, 634 F.2d 1188, 1195 (9th Cir. 1980)).

The evidence presented to the district court simply does not support the dealers' contention that there was a horizontal price-fixing conspiracy between GM and the transporation companies. An expert for GM submitted to the district court the following sworn statement: "The carriers do not participate in any way or have any role whatsoever in establishing or determining General Motors' agreements and arrangements with its dealers." In addition, the stipulated facts support GM's contention that there is no conspiracy between it and any carrier to fix prices for transportation damage claims. Under the Dealer Agreements, the procedures

for compensating dealers for repairs to damaged vehicles are set forth in the applicable Service Policies and Procedure Manuals and, according to the stipulated facts, "[t]hese manuals are prepared solely by General Motors."

The dealers' response is that the contractual arrangements between GM and the carriers for shipping vehicles to the dealers is sufficient proof, under liberal standards, to infer a conspiracy. This contention is unpersuasive. The antitrust laws are not offended by agreements as such, but only by those with an anticompetitive content. 6 P. Areeda, *Antitrust Law* ¶ 1400 at 4 (1986). Ordinary sales contracts do not unlawfully restrain trade; indeed, trade would be impossible without them. *See* 7 *id.* ¶ 1437 at 3. Doubtful "agreements" should not be so characterized for antitrust purposes unless the challenged conduct is of the kind the antitrust laws would have us scrutinize. 6 *id.* ¶ 1400 at 4; *see also Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984). The particular contract here between GM and its carriers, standing alone, falls short of establishing an unlawful "agreement;" we decline to infer an antitrust conspiracy merely on the basis of that contract.

"On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement." *Monsanto Co.*, 465 U.S. at 763; *see also Program Engineering*, 634 F.2d at 1195. In this case there is no agreement among competitors to set prices. Because the dealers have failed to carry their burden, we conclude that the district court properly granted summary judgment for the defendants on the horizontal price-fixing claim.

B. *Vertical Price-Fixing*

The dealers contend that, after GM and the carriers horizontally conspired to fix the prices for repairing damaged vehicles, these prices were imposed on them. They argue that the imposition of such prices constituted *vertical* price-fixing which should be regarded as per se illegal. We find these contentions unpersuasive.

First, as already discussed, the dealers' argument that there was horizontal price-fixing in this case is meritless. Accordingly, this court, like the District of Columbia Circuit in *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 338 (D.C. Cir.), *cert. denied*, 450 U.S. 839 (1982), need not decide whether the alleged vertical arrangements would be unlawful if they had been used to implement an unlawful horizontal agreement or conspiracy in restraint of trade.

In addition, the dealers' underlying argument that the alleged vertical price-fixing of repair prices constituted per se violations of the antitrust laws is unconvincing. In the first instance, the dealers' argument ignores the principle that allegations of vertical price-fixing are generally evaluated under the "rule of reason" rather than considered to be per se antitrust violations. *See Quality Auto Body*, 660 F.2d at 1202-03. In addition, it is a longstanding antitrust principle that Section 1 of the Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. *Id.* at 1205 (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)). *Cf. Monsanto Co.*, 465 U.S. at 761 ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."). Applying these principles to the facts of this case, the district court properly concluded that GM's damage repair arrangements with its dealers did not constitute a vertical price-fixing arrangement in violation of the Sherman Act.

III

Dealer Compensation For Warranty Repairs

The GM dealers contend that the arrangement for compensating them for work done under the manufacturer's warranty was per se unlawful for two reasons: (1) it was an unlawful form of price fixing; and (2) it involved an illegal tying arrangement. Neither contention has merit.

A. *Price-Fixing*

The dealers argue that the existing system by which GM compensates dealers for warranty repairs is a per se unlawful form of vertical price-fixing. Specifically, the dealers complain that their rate of compensation is "fixed" by the terms of the Service Policies and Procedures Manuals. They challenge the lawfulness of these "fixed" prices based on certain cases holding that the setting of minimum and maximum resale prices by manufacturers or suppliers violates the Sherman Act, Section 1. *See e.g., Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (publisher's establishment of maximum resale price of newspapers sold by carriers held per se violation of Section 1); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (distillers' agreement to fix maximum resale prices of their products sold by distributors held per se violation of Section 1).

The dealers' reliance on the resale price maintenance cases is misplaced. This is simply *not a case involving the "resale" of any goods or services to retail customers.* The stipulated facts clearly show that owners of new cars are not charged for warranty repairs. Because the dealer compensation arrangement challenged here does not involve any kind of resale, the cases relied on by the dealers are inapplicable.

The warranty repair compensation arrangements at issue here are best characterized as agreements between GM and its dealers to *establish a price at which GM will buy warranty repair parts and services from its dealers.* Because such arrangements are not manifestly anti-competitive, we do not believe that they constitute per se violations of the antitrust laws. *See Medical Arts Pharmacy v. Blue Cross & Blue Shield*, 675 F.2d 502, 504-06 (2d Cir. 1982) (pharmacy agreements, which establish the maximum price Blue Cross will pay participating pharmacies for prescription drugs, are not per se illegal). Accordingly, we conclude that the district court properly dismissed the dealers' antitrust claims based on alleged price-fixing of the rates at which GM compensated its dealers for repairs made under GM warranties.

B. *Tying Arrangements*

The dealers contend that GM's mandatory requirement that they do warranty work in order to keep their franchises is an illegal tying arrangement. Specifically, they argue that GM has unlawfully required dealers who wished to sell GM vehicles, the tying product, to perform warranty services compensated at precise amounts, the tied product.

We agree with the district court that the warranty payment arrangements at issue here fail to meet existing definitions of an unlawful tie-in. A tying arrangement has been defined as an agreement in which a seller will sell one product (the tying product) on the condiditon that the buyer purchase a second product (the tied product). *See Northern Pacific Railway v. United States*, 356 U.S. 1, 5-6 (1958); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1338 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3534 (1985). In this case, where the dealers perform repair services for GM and are paid by GM, *they are not buyers of an allegedly tied product at all, but are sellers. Accordingly, the court was correct that the existing case law on tying does not apply.*

The dealers, recognizing this difficulty, have argued for an extension of tying law to the circumstances of this case. We decline to do so. The issue is not one of mere semantics. The Supreme Court has indicated that the legality of any particular arrangement depends not on whether the challenged conduct can be labeled "tying," but rather on its competitive effects. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1563, nn. 33 & 34 (1984). Because the dealers in this case failed to make an adequate *showing of harmful anticompetitive effects resulting from the existing warranty payment arrangements*, we conclude that the district court properly held that these arrangements do not violate the antitrust laws.

IV

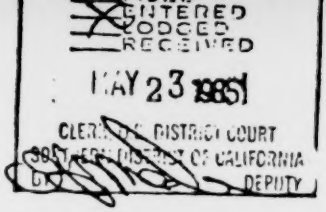
The Pendent State Claims

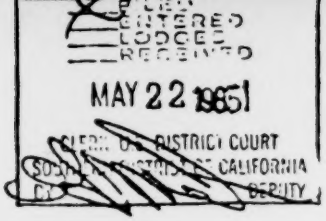
The final issue on this appeal is whether the district court erred in dismissing the dealers' pendent state claims. Because the court dismissed all of the dealers' federal claims, it properly exercised its discretion in dismissing the pendent state claims as well. *See Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1753 (1985).

AFFIRMED.

B.

DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS





UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

49er CHEVROLET, INC., etc. et al.,	) Civ. No. 82-1363-T
Plaintiffs,	) ORDER GRANTING SUMMARY) *JUDGMENT FOR DEFENDANTS*
v.	)
GENERAL MOTORS CORPORATION, etc. et al.,	)
Defendants.	)

Plaintiffs are former dealers and former owners of dealerships involved in the sale of motor vehicles manufactured by General Motors Corporation [GM]. Each plaintiff had entered into a contract, entitled "Dealer Sales and Service Agreement," with GM which established the rights and duties of the parties. Defendants are GM, E.F. MacDonald Company [EFM], Insured Transporters, Inc. [IT], and Pacific Motor Transport [PMT]. EFM is a corporation which sells sales-incentive services including prizes and travel packages. IT and PMT are corporations engaged in the business of transporting vehicles.

On October 14, 1982, plaintiffs filed a complaint in this court. On March 21, 1983, a first amended complaint containing five "counts" was filed. Counts I and II include federal and state antitrust claims. Counts III and V are state law claims based upon California Business and Professions Code section 17200 and California Vehicle Code section 11713.3, respectively. Count IV, a Civil RICO claim under 18 U.S.C. § 1952, was dismissed by this court in May 1983.

Plaintiffs and defendants have moved for summary judgment. In connection with the motitons for summary judgment, the parties have submitted extensive briefs and a memorandum of stipulated facts.

In Count One, plaintiffs [Dealers] allege that defendants (GM, divisions of GM, IT, PMT and certain unnamed "co-conspirators") have violated Section One of the Sherman Act, 15 U.S.C. §1, and section 16720 of the California Business and Professions Code. In the first amended complaint, plaintiffs' counsel seems to assert that the Sherman One violation arises from (1) a conspiracy between GM and certain unnamed. co-conspirators to compel the dealers to perform warranty repair work at prices set by GM, and (2) a conspiracy between GM, IT and PMT to compel the plaintiffs to perform in-transit damage repair work at fixed prices set by GM. See first amended complaint, pp 8-10; see also plaintiffs' memorandum of points and authorities in support of motion for summary judgment.

A review of the stipulated facts reveals that the dealers are obligated, under the Dealership Agreements with GM, to perform warranty repair work on vehicles with warranties in effect between GM and the car owner. GM is obligated under the Dealership Agreements to pay the dealers for labor and to provide or pay the dealers for parts and other materials used in the repair. The Dealership Agreements further provide that the amount of payment is to be made in accordance with GM's Service Policies and Procedure Manual [SPP]. The SPP manual, prepared by GM and amended from time to time by GM, sets forth the procedure for determining the amount of the payment for labor. If the repair is for an item listed in the applicable GM division's Labor Time Guide, then the amount of any payment is computed by multiplying the amount of time shown in the Labor Time Guide by the dealer's approved warranty labor rate. See Stipulated Fact #13. The approved warranty labor rate is determined in one of two ways set forth in the SPP Manual. See Stipulated Facts 16-29. When no time is set forth in the Labor Time Guide for a given item of warranty work, the dealer is paid on the basis on the clock time expended for the repair, if GM determines that the time expended is fair. Stipulated Fact 13.

That this arrangement for determining prices to be paid for labor is not a price-fixing scheme in violation of Section One of the Sherman Act is evident upon a review of the case law. First, the arrangement is not horizontal conspiracy to fix prices because there is no agreement in this case among competitors to set prices. *See United States v. Trenton Potteries Co.*, 273 U.S. 392 (1972); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982); *United States v. Champion Int'l Corp.*, 557 F.2d 1270 (9th Cir. 1977), *cert. denied*, 434 U.S. 938 (1978).

That the arrangement in this case is not a vertical price fixing scheme in violation of Section One of the Sherman Act is equally evident. The arrangement is not a per se illegal resale price maintenance scheme because there is no resale in this case. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The GM arrangement in no way enables those who repair automobiles to achieve the price fixing results that would ensue if the automobile repair persons were able to horizontally conspire to fix prices for motor vehicle repair. In addition, that there is no price-fixing violation of the Sherman Act under the rule of reason is evident upon a review of analogous cases involving "provider" or "pharmacy" agreements between insurers and health care providers or pharmacies. *See Proctor v. State Farm*, 675 F.2d 308 (D.C. Cir. 1982); *Quality Auto Body v. Allstate Insurance, Co.*, 660 F.2d 1195 (7th Cir. 1981). Without proof of something more than merely contracts between buyers and sellers determining the prices to be charged the buyers entering into the contracts, the arrangements are not violative of Section One of the Sherman Act as price fixing arrangements.

The same analysis is applicable to plaintiffs' assertion that the in-transit damage repair provisions violate Section One of the Sherman Act, 15 U.S.C. §1. The Dealership Agreement obligates the dealer to repair damage which occurs in-transit upon GM vehicles. The contract obligates GM to pay the dealer for the repair, and the amount of payment is determined in substantially the same manner as for warranty repairs. Accordingly, the in-

transit damage repair provisions are not part of a price-fixing scheme in violation of Section One of the Sherman Act.

Plaintiffs have also argued that the actions of GM reveal a per se illegal tying arrangement in violation of Section One of the Sherman Act. A tying arrangement is "an agreement by a party to sell one product, but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from any other supplier." *Northern Pac. Ry. v. United States,* 356 U.S. 1, 5-6 (1958). Plaintiffs assert that the tying products are GM vehicles and the tied products are services (warranty repair and in transit damage repair) which plaintiffs are required to perform and parts which plaintiffs need in order to perform the repair work.

Although plaintiffs have used the proper tying arrangement terminology in attempting to state a Sherman One tie-in, the claim nonetheless fails. This court could construe the arrangements in this case as involving but one product, a "dealership" where the product is the GM car complete with GM warranty to consumers and certain servicing obligations, rather than two separate products. *See Times-Picayune Publishing Co. v. United States, 345 US. 594 (1953); Hirsh v. Martindale-Hubbell, Inc.*, 1982-2 Trade Cas. (CCH) ¶64,723 (9th Cir. 1982); *Foster v. Maryland State Sav.* ducts. *See Times-Picayune Publishing Co. v. United States*, 345 US 594 (1953); *Hirsh v. Martindale-Hubbell, Inc.*, 1982-2 Trade *Hyde*, ____U.S.____, 104 S.Ct. 1348 (1984). However, the court need not resort to such an interpretation because the tying law is inapplicable to the automobile sales and repair work provisions in this case.

For any particular scheme to constitute an illegal tying arrangement, the purchase of one (tying) product must be conditioned upon the purchase of another (tied) product. *See Northern Pac. Ry., supra,* 356 U.S. at 5,6; *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1338 (9th Cir. 1984). The most that can be said of the arrangements in this case is that under the terms of the Dealership Agreements, the plaintiffs are able to purchase GM vehicles, but are obliged to provide or sell their services in repair-

ing (warranty work and in-transit damage) the GM vehicles. The tie-in case law has no application to these circumstances because there simply is no purchase of one product conditioned upon the purchase of another.

Plaintiffs' tying claim may be that GM conditions the purchase of its GM vehicles upon the purchase of GM replacement parts to be used in repairs of GM vehicles. However, this claim is unsupported by the facts. In performing the warranty and in-transit damage repairs, the dealers are permitted to use non-GM parts. See Stipulated Facts 20, 20B, Ex. F to Wilmshurst Affidavit. Further, the court notes that even if GM did require the use of GM parts when warranty repairs are made, several courts have indicated that such a requirement is not a Sherman One violation. *See IAP, Inc. and Imported Automotive Parts, Ltd. v. Mercedes-Benz of North America, Inc.*, 571 F. Supp. 262, 266 (D.N.J. 1983); *Metrix Warehouse, Inc. v. Daimler Benz Aktiengsellschaft & Mercedes-Benz of North America, Inc.*, 1982-2 Trade Case. (CCH), ¶64,861 (D.Md. 1982), *rev'd in part on other grounds*, 1983-2 Trade Cas. (CCH) ¶65,574, (4th Cir. 1983), *reconsidered*, 1984-1 Trade Cas. (CCH) ¶65,766 (D.Md. 1984), *reinstated*. 1984-2 Trade Case. (CCH) ¶66,226 (D. Md. 1984); *United States v. Mercedes-Benz of North America*, 517 F. Supp. 1369 (N.D. Cal. 1981).

Accordingly, summary judgment for defendants is appropriate as to Count I.

In Count II plaintiffs allege that an incentive package program sold to dealers by EFM in a GM sponsored dealer incentive program violates Section One of the Sherman Act., 15 U.S.C. §1, section three of the Clayton Act, 15 U.S.C. §14, and California's Cartwright Act, Cal. Bus. & Prof. Code §16720. Specifically plaintiffs contend that the incentive package program constitutes a per se illegal tying arrangement.

The stipulated facts reveal that GM sponsors programs, such as that of EFM at issue in this case, in which participating dealers pay an enrollment fee and compete for packages and awards based on achieving certain individual or group sales objectives. See

Stipulated Facts 35-53. Although the written terms of the contests provide that dealer participation is voluntary, plaintiffs argue that participation is not voluntary. Even assuming mandatory participation, summary judgment as to the federal tying claim must be granted for defendants.

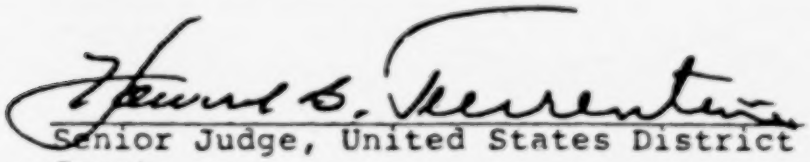
As noted, supra, an unlawful tying arrangement is defined for purposes of both the Sherman and Clayton Acts, as an arrangement by a seller to sell one product, but only on the condition that the buyer also purchase a second product. *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476 (9th Cir. 1983); *Foremost ProColor v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983). Usually, the tying and tied products are sold by the same seller. When, as here, the tied product is sold by a third party engaged in a separate line of commerce, the plaintiff must demonstrate that the tying party has a financial or economic interest in the seller of the tied product or in the tied product itself. *Roberts, supra*, 708 F.2d at 1480. The economic interest sufficient to support a tying claim involving a third party seller must consist of a tangible direct economic benefit from the sales of the tied product or a direct financial interest in the third party. A benefit in increase in revenue due to increased sales as a result of the incentive program is insufficient. *See Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958); *Roberts Waikiki U-Drive v. Budget Rent-A-Car*, 491 F. Supp. 1199 (D.Ha. 1980).

Because GM has no economic or financial interest in EFM or EFM's products or services, Stipulated Fact 30, the arrangement here is not a per se illegal tying arrangement. In addition, the incentive program is not illegal under the rule of reason because the primary purpose of the promotional programs such as the one at issue in this case is to increase competition. *See Miller Motors, Inc., supra; Nelligan v. Ford Motor Co.*, 262 F. 2d 556 (4th Cir. 1959); *Sunrise Toyota Ltd. v. Toyota Motor Car. Co.*, 55 F.R.D. 519 (S.D.N.Y. 1972).

Accordingly, the court hereby GRANTS summary judgment for defendants with respect to the federal claims stated in Counts I and II. All remaining state law claims are dismissed.

SO ORDERED.

DATED: May 15, 1985.



Senior Judge, United States District Court

C.

STATUTES

California Business and Professions Code Sections 17200, et seq.:

Section 17200. Definitions

> As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue, or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

Section 17202. Specific or Preventative Relief.

> Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

Section 17203. Remedies and Jurisdiction.

> Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

California Business and Professions Code Section 17026 and 17048.5:

Section 17026. 'Cost': Prohibition Against Cost Reductions By Cash Discounts.

'Cost' as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer.

'Cost' as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business.

'Cost' as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency.

Discounts granted for cash payment shall not be used to reduce costs.

Section 17048.5. Contract With Service Or Repair Agency For Performance Of Warranty Service and Repair For Products Manufactured, Etc., Below Cost To Such Service Or Repair Agency

It is unlawful for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of any such person, to enter into any contract with any service or repair agency for the performance of warranty service and repair for products manufactured, distributed, or sold by such person, below the cost to such service or repair agency of performing the warranty service or repair.

(2)

Supreme Court, U.S.
FILED
MAR 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1317

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

49ER CHEVROLET, INC.; RICHARD E. WILMSHURST; ROBERT BATEY; and MARTIN GOLDBERG, Trustee in Bankruptcy of ULYSSES, INC.,

Petitioners,

v.

GENERAL MOTORS CORPORATION; INSURED TRANSPORTERS, INC.; and PACIFIC MOTOR TRANSPORT COMPANY,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

MEMORANDUM IN OPPOSITION

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Attorneys for Respondent
Pacific Motor Transport
Company

6 pp

Respondent Pacific Motor Transport Company ("PMT") has received the Petition for Certiorari in this matter. Upon reviewing the Petition, it appears that PMT is not directly affected by the matters raised in the Petition.

The opinion below set out the two issues which petitioners had raised in the court of appeals:

> "On appeal, the dealers . . . continue to challenge: (1) GM's system of payments to dealers for repairing vehicles damaged in transit, and (2) GM's system for compensating dealers for repairs performed under the manufacturer's warranty." Petition for Writ of Certiorari (hereinafter "Petition") at A-3.

As to the first issue, the dealers alleged that there was a horizontal price-fixing agreement between GM and the two other defendants, PMT and

Insured Transporters, Inc. ("Insured"), on the prices the dealers received from GM for making repairs to vehicles damaged in transit. In their Petition for Certiorari, petitioners do not challenge the Ninth Circuit's holding that there was insufficient evidence to support petitioners' allegations of a horizontal conspiracy between GM, PMT and Insured. It was on that basis that the Ninth Circuit affirmed the district court's grant of summary judgment. Petition at A-6. Thus, the issue of GM's system of payments for repairing vehicles damaged in transit -- the only issue concerning PMT -- is not before this Court.

PMT therefore submits this memorandum in lieu of a formal brief in opposition to the petition and joins in the position set forth in General Motors

Corporation's Brief in Opposition to the Petition.

Dated: March 5, 1987

Ann Fingarette Hasse

Ann Fingarette Hasse
Attorneys for Respondent
Pacific Motor Transport
Company

DECLARATION OF SERVICE
BY MAIL

I, Beverly Andrews, say and declare:

I am a citizen of the United States, over eighteen years of age, and not a party to the within action. My business address is One Sansome Street, Suite 3130, San Francisco, CA 94104.

That on March 3, 1987, I served a copy of the foregoing Memorandum in Opposition via United States First Class Mail on the following parties of record:

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and by then sealing said envelopes and depositing same into the United States Mail, postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 5, 1987, at San Francisco, California.

Beverly J. Andrews

Beverly J. Andrews

No. 86-1317

Supreme Court, U.S.
FILED
MAR 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

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OCTOBER TERM, 1986

49ER CHEVROLET, INC.; RICHARD E. WILMSHURST; ROBERT BATEY; and MARTIN GOLDBERG, Trustee in Bankruptcy of ULYSSES, INC.,

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v.

GENERAL MOTORS CORPORATION; INSURED TRANSPORTERS, INC.; and PACIFIC MOTOR TRANSPORT COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does an agreement between a manufacturer and its dealer constitute unlawful price fixing under the Sherman Act where the agreement involves no resale of goods or services to third parties and merely provides that the dealer will perform warranty repairs on the manufacturer's products and be paid for those repairs by the manufacturer in accordance with policies and procedures established by the manufacturer?

PARTIES INVOLVED

The parties to the proceeding in the Court below are those set forth in the caption. Pursuant to Supreme Court Rule 28.1, General Motors Corporation states that it is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly owned, except those set forth in the Appendix.

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Sun Oil Co. v. Vickers Refining Co., 414 F.2d 383 (8th Cir. 1969)	5
Travelers Insurance Co. v. Blue Cross, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973)	5
United States v. Colgate & Co., 250 U.S. 300 (1919)	4
Workman v. State Farm Mutual Automobile Insurance Co., 520 F. Supp. 610 (N.D. Cal. 1981)	6

Respondent General Motors Corporation ("General Motors") respectfully submits that issuance of a writ of certiorari to review the November 5, 1986, opinion of the United States Court of Appeals for the Ninth Circuit in this matter would be inappropriate.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 803 F.2d 1463 (9th Cir. 1986). The opinion of the United States District Court for the Southern District of California is not reported and is set forth as Appendix B to the Petition.

STATEMENT OF THE CASE

The case below was filed by three former dealers of motor vehicles manufactured by General Motors.[1] Although the original complaint challenged a diverse array of practices by General Motors and asserted various federal and state claims for relief, the sole subject of the Petition pertains to the long-established system by which General Motors compensates its dealers for performing warranty repairs on vehicles manufactured by General Motors.[2]

The material facts were not disputed and are primarily contained in an extensive joint stipulation submitted to the district court and which is included in the record of the Court of Appeal as CR 96.[3] Fol-

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[1] The termination of petitioners' status as dealers occurred for reasons separate from and independent of the matters asserted in this case and the reasons for the termination are not in issue.

[2] *See, e.g.*, Petition at 5.

[3] These stipulated facts were supplemented by the affidavits submitted by the parties with their summary judgment motions.

lowing the submission of the joint stipulation of facts, and pursuant to the agreement of the parties, the matter was submitted to the district court for determination upon cross-motions for summary judgment. After hearing upon the cross-motions, the district court granted summary judgment for defendants and respondents. Petitioners appealed and the Ninth Circuit affirmed.[4]

The essential facts pertinent to the Petition are as follows:

To promote sales of its automotive products, General Motors extends to consumers limited express warranties on General Motors cars and trucks purchased from General Motors dealers (CR 96, Stip. of Facts ¶ 11). Under specified conditions, these warranties obligate General Motors to repair certain defects that arise in its products within a certain time and mileage of initial sale.

To give effect to its warranties, General Motors enters into Dealer Sales and Service Agreements in which the dealers agree, among other things, to perform service required under the General Motors warranties and to be compensated for these services by General Motors (*id.* ¶ 12(a)). Under the terms of the Agreements and the applicable Service Policies and Procedures Manual, General Motors agrees to pay the dealer a fair and adequate amount for labor and either to provide or pay the dealer for parts and other materials required (*id.* ¶ 12(b)).

The Service Policies and Procedures Manuals are prepared solely by General Motors and as amended

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[4] *49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463 (9th Cir. 1986).

from time to time are provided to the dealer (*id.* ¶¶ 12 and 22). Each manual specifies procedures for determining the amount of compensation General Motors will pay the dealer for performing warranty repairs, based upon such factors as the amount of labor to perform the repair, the dealer's independently established retail customer labor rate for non-warranty service, the dealer's costs of labor and parts, and an allowance for dealer overhead (*see generally id.* ¶¶ 13-20D).[5] The retail owner pays nothing and purchases nothing from either the dealer or General Motors in respect to labor performed or parts, accessories or other materials furnished in connection with services or repairs covered by the General Motors warranties (*id.* ¶ 25).

REASONS FOR DENYING THE WRIT

The opinion of the Ninth Circuit Court of Appeals as well as the order of the district court make plain that the matter raised by the Petition presents no novel or controversial issue of federal law. Instead, the decision involves nothing more than the application of established legal precedent to findings of fact derived from the stipulated record in the district court.

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[5] Under the manuals, dealers are reimbursed for parts used (which the dealer may obtain from General Motors or others) at 130% of their cost and may elect either of two options for reimbursement for labor. Under the first option, the warranty labor rate is identical to the labor rates posted in the dealership for retail customers; under the second, the warranty labor rate is 240% of the average base rate for productive technicians plus 100% of the technicians' voluntary and legislated fringe benefits, but not to exceed the dealer's stated retail customer rate. CR 96, Stip. of Facts ¶¶ 16-20.

In a disingenuous effort to create a novel or controversial issue where none exists, the Petition mistakenly seizes upon language contained in the opinion below dealing with an abandoned and irrelevant claim concerning in transit damage to motor vehicles, and suggests that in determining the warranty issue the Ninth Circuit purports to abrogate the holding of this Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and other cases, that vertically imposed resale price maintenance constitutes a per se violation of the antitrust laws.[6] In fact, the Ninth Circuit held, as the district court had found, that the stipulated facts "clearly show" that the system by which General Motors compensates its dealers for warranty repairs does not involve a resale to third parties and therefore the resale price maintenance cases relied on by petitioners are inapplicable:

> The dealers' reliance on the resale price maintenance cases is misplaced. This is simply not a case involving the "resale" of any goods or services to retail customers. The stipulated facts clearly show that owners of

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[6] The language upon which the Petition relies expressly relates not to the Ninth Circuit's disposition of petitioners' warranty claim but instead, as the quoted language itself demonstrates, to claims arising out of "GM's [in transit] damage repair arrangements with its dealers." *49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463, 1468 (9th Cir. 1986). That different claim, which is not the subject of the Petition, was quite properly decided by application of "rule of reason" principles, following the teaching of *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195, 1202-03 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982), which involved similar factual arrangements and by the principles enunciated by this Court in *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

> new cars are not charged for warranty repairs. Because the dealer compensation arrangement challenged here does not involve any kind of resale, the cases relied on by the dealers are inapplicable.

803 F.2d at 1468.

The district court found, and the Ninth Circuit agreed, that the warranty repair compensation arrangements at issue were nothing more than agreements between General Motors as buyer and its dealers as sellers "to establish a price at which GM will buy warranty repair parts and services from its dealers".[7]

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[7] 803 F.2d at 1468. And, like every other court that has considered the issue, the court rejected the proposition that an agreement which does no more than merely establish the price to be charged between the buyers and sellers who are parties to the agreement constitutes unlawful price fixing. *See, e.g., Kartell v. Blue Shield, Inc.*, 749 F.2d 922, 925-26 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985); *Royal Drug Co. v. Group Life & Health Insurance Co.*, 737 F.2d 1433, 1436-38 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc.*, 675 F.2d 502, 505-06 (2d Cir. 1982); *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 337-38 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982); *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195, 1203 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978); *Travelers Insurance Co. v. Blue Cross*, 481 F.2d 80, 84 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383, 389-90 (8th Cir. 1969); *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 603 F. Supp. 1077, 1086-87 (S.D. Ind. 1985), *aff'd*, 784 F.2d 1325 (7th Cir. 1986); *Feldman v. Health Care Service Corp.*, 562 F. Supp. 941, 947-48 (N.D. Ill. 1982); *Kartell v. Blue Shield, Inc.*, 542 F. Supp.

Notwithstanding the plethora of conclusory and argumentative statements contained in the Petition regarding the purported anticompetitive effects of the warranty repair agreements between General Motors and its dealers, those statements are without support in the record upon which the district court made its determination and the Ninth Circuit so held:

> [T]he dealers in this case failed to make an adequate showing of harmful anticompetitive effects resulting from the existing warranty payment arrangements . . . ."

803 F.2d at 1469.

From the outset, this case has raised no substantial issue under the federal antitrust laws. Petitioners are simply unhappy with the amount of compensation they received for performing warranty repairs under their

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782, 795-96 (D. Mass. 1982); *Workman v. State Farm Mutual Automobile Insurance Co.*, 520 F. Supp. 610, 624-25 (N.D. Cal. 1981); *Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc.*, 518 F. Supp. 1100, 1107 (D. Conn. 1981), *aff'd*, 675 F.2d 502 (2d Cir. 1982); *Sausalito Pharmacy, Inc. v. Blue Shield*, 544 F. Supp. 230 (N.D. Cal. 1981), *aff'd per curiam*, 677 F.2d 47 (9th Cir.), *cert. denied*, 459 U.S. 1016 (1982); *Blue Cross & Blue Shield v. Michigan Ass'n of Psychotherapy Clinics*, 1980-2 Trade Cas. (CCH) ¶ 63,351, at 75,793-94 (E.D. Mich. 1980); *American Telephone & Telegraph Co. v. Delta Communications Corp.*, 408 F. Supp. 1075, 1102 (S.D. Miss. 1976), *aff'd*, 579 F.2d 972 (5th Cir. 1978), *modified and reh'g denied*, 590 F.2d 100 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979); *Knuth v. Erie-Crawford Dairy Cooperative Ass'n*, 326 F. Supp. 48, 53 (W.D. Pa. 1971), *aff'd in part, rev'd in part on other grounds*, 463 F.2d 470 (3d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp. 780, 786-87 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); *Fagan v. Sunbeam Lighting Co.*, 303 F. Supp. 356, 360-61 (S.D. Ill. 1969).

agreements with General Motors. If they have a valid complaint at all (which they do not) their remedy is under state law.[8]

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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March, 1987

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[8] In their complaint below, petitioners alleged such claims under a variety of state statutes. These pendent state claims were dismissed on jurisdictional grounds and, while referred to in the Petition are not now properly before the Court. *See, e.g.*, Petition at 3 and 23.

APPENDIX

APPENDIX

SUBSIDIARIES OF GENERAL MOTORS CORPORATION OTHER THAN WHOLLY OWNED SUBSIDIARIES

Alambrados Automatrices, S.A. de C.V. (Mexico)

Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)

AMBRAKE Corporation (USA)

Aralmex, S.A. de C.V. (Mexico)

Automotriz Gencor S.A. (Ecuador)

Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)

Cableados de Juarez, S.A. de C.V. (Mexico)

CABLESA-Industria de Componentes Electricos Limitada (Portugal)

Calsonic Harrison Co., Ltd. (Japan)

Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)

Componentes Mecanicos de Matamoros, S.A. de C.V. (Mexico)

Compresores Delfa, C.A. (Venezuela)

Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)

Convesco Vehicle Sales GmbH (West Germany)

Daewoo Automotive Components, Ltd. (Korea)

Daewoo Motor Co., Ltd. (Korea)

Delco Electronics Corporation (USA)

Delkor Battery Company, Ltd. (Korea)

Delmex de Juarez, S.A. de C.V. (Mexico)

Delnosa, S.A. de C.V. (Mexico)

Delredo, S.A. de C.V. (Mexico)

Deltronicos de Matamoros, S.A. de C.V. (Mexico)

Detroit Deere Corporation (USA)

DHB - Componentes Automotivos S.A. (Brazil)

DHMS Industries, Ltd. (Korea)

DR DE CHIHUAHUA, S.A. de C.V. (Mexico)

Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)

General Motors Argentina S.A. (in liquidation) (Argentina)

General Motors de Colombia S.A. (Colombia)

General Motors Egypt, S.A.E. (Egypt)

General Motors Espana, S.A. (Spain)

General Motors (Europe) AG (Switzerland)

General Motors France (France)

General Motors Hellas, A.B.E.E. (Greece)

General Motors-Holden's Limited (Australia)

General Motors Iran Limited (Iran)

General Motors Kenya Limited (Kenya)

General Motors Korea Co., Ltd. (Korea)

General Motors del Peru S.A. (Peru)

General Motors de Portugal, Limitada (Portugal)

General Motors Terex do Brasil Ltds. (Brazil)

GM Allison Japan Limited (Japan)

GM Locomotivas Ltda. (Brazil)

GMFanuc Robotics Corporation (USA)

Hua Tung Automotive Corporation (Rep. of China)

Ilmor Engineering, Ltd. (England)

Industries Mecaniques Maghrebines, S.A. (Tunisia)

Industrija Delova Automobila, Kikinda (Yugoslavia)

INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)

Isuzu Motors Limited (Japan)

Isuzu Motors Overseas Distribution Corp. (Japan)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Koram Plastics Company, Ltd. (Korea)

Metal Casting Technology, Inc. (USA)

Moto Diesel Mexicans, S.A. de C.V. (Mexico)

Motor Enterprises, Inc. (USA)

New United Motor Manufacturing, Inc. (USA)

NHK Inland Corporation (Japan)

Omnibus BB Transportes, S.A. (Ecuador)

Promotora de Partes Electronicos Automotrices (Mexico)

P.T. Mesin Isuzu Indonesia (Indonesia)

Rimir, S.A. de C.V. (Mexico)

Rio Bravo Electricos, S.A. de C.V. (Mexico)

Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)

Shinsung Packard Company, Ltd. (S. Korea)

Sistemas Electricos y Conmutadores, S.A. de C.V. (Mexico)

Sung San Company, Ltd. (S. Korea)

Suzuki Motor Co., Ltd. (Japan)

TEREX Equipment Limited (Scotland)

Unicables, S.A. (Spain)

Vauxhall Motors Limited (England)

Vestiduras Fronterizas, S.A. de C.V. (Mexico)